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March 7, 2005

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth St., S.W.
Washington, D.C. 20554

Re: IP-Enabled Services, WC Docket No. 04-36;
Level 3 Petition for Forbearance, WC Docket No. 03-266

Dear Ms. Dortch:

WilTel Communications, LLC ("WilTel") has submitted a White Paper in these dockets explaining in detail how and why the Commission should require LECs to tariff the PSTN termination service they provide to VoIP companies. 1/ This narrow remedy is the appropriate means to end unlawful discrimination and bring crucial certainty to the VoIP market. Termination tariffs address the market power that each LEC holds over VoIP providers who must send calls destined for the LEC's end users over the LEC's public switched network. This limited tariff remedy leaves the Commission free to establish different termination rate methodologies for different kinds of LECs, while still ensuring that no VoIP provider is prejudiced by discrimination when it needs to send a call to a LEC's customer. 2/ And this approach is consistent with an unregulated market for VoIP service itself. 3/

1/ *See* "Broadband VoIP Termination to the Public Switched Network: Advancing VoIP Through Non-Discrimination," WilTel Communications, LLC, WC Docket Nos. 04-36 and 03-266 (filed Feb. 18, 2005) ("*WilTel White Paper*").

2/ The Commission must establish interim LEC rates now for termination of interstate VoIP, pending intercarrier compensation reform. Failure to act is itself *de facto* action, leaving in place the current chaos and discrimination in the rates LECs charge to terminate VoIP. Under WilTel's proposal, the Commission could require the tariffed rate for terminating VoIP traffic to be set equal to any number of proxies: reciprocal compensation rate levels (as Level 3 and others request), the current proxy rate for ISP-bound termination, interstate access, or something else. Different methodologies can be ordered for LECs in different geographic areas. But importantly, rates for VoIP termination will be charged pending intercarrier compensation reform; tariffs would ensure that, in the interim, those rates would be the same for all VoIP providers and that LECs would not be allowed to misuse their market power.

3/ Nor does this proposal for addressing LEC rates for PSTN termination depend on whether the Commission ultimately decides that VoIP itself is a telecommunications or information service.

In a recent ex parte filing, Level 3 agrees with WilTel that the Commission urgently must provide regulatory certainty over " 'who pays whom' and 'how much' for IP-PSTN traffic." 4/ But Level 3 criticizes WilTel's tariff-based solution, mischaracterizing that proposal and ignoring WilTel's observations regarding the market power of LECs over VoIP termination to the PSTN. This presumably is because Level 3's forebearance proposal threatens to institutionalize current *de facto* discrimination in favor of LECs like Level 3 when they terminate VoIP. However, that result would be unlawful, and would undermine the ability of VoIP to reach its full competitive potential.

Level 3 presents four arguments against mandatory LEC tariffs for VoIP termination to the PSTN. WilTel's response, provided below, underscores why WilTel's solution is the least regulatory and most simple way to address LEC market power in this crucial area.

A. The Commission Recognizes the Need for Tariffs in Comparable Situations Involving Ubiquitous LEC Termination of Interstate Services.

In its White Paper, WilTel discusses in detail the practical problem facing a VoIP provider. No matter how large or small its customer base, it still must be able to terminate its customers' broadband-originated calls ubiquitously to any of tens of millions of PSTN lines, controlled by thousands of different LECs, in every community in the nation.

Level 3 ignores this basic fact and simply asserts in a single paragraph that the Commission prefers negotiated interconnection agreements over tariffs, citing the recent *T-Mobile Declaratory Ruling*. But this assertion ignores the basic fact that the Commission and the Communications Act provide for tariffs where, as here, negotiation is not practical.

Indeed, the *T-Mobile Declaratory Ruling* itself underscores why VoIP termination rates should be subject to tariff. 5/ In that order the Commission addressed a very different circumstance -- exchange of calls between LECs and wireless carriers within a defined local calling area (intra-MTA). The Commission found that this exchange of local traffic was susceptible to interconnection negotiations and should be resolved on that basis going forward. For the calls at issue in the *T-Mobile Declaratory Ruling*, both the CMRS carrier and the LEC have subscribers in the same local calling area who need to call one another; it is precisely this *reciprocity* that leads the 1996 Act to specify "*reciprocal* compensation" for such traffic, and that facilitates inter-carrier negotiation. Each of the carriers has something that the other carrier needs – control over access to its own subscribers – and this facilitates a negotiation process in

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4/ Letter from John Nakahata, Counsel for Level 3, to Marlene Dortch, WC Docket Nos. 03-266 and 04-36, at 2 (filed March 2, 2005) ("*Level 3 March 2 Letter*").

5/ *Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling and Report and Order, CC Docket No. 01-92, FCC 05-42 (released Feb. 24, 2005) ("*T-Mobile Declaratory Ruling*").

which both carriers have some degree of bargaining leverage. In that context, the Commission ruled that unilateral, intrastate tariffs would henceforth be impermissible because "negotiated agreements between carriers are more consistent with the pro-competitive process and policies reflected in the 1996 Act." 6/

By contrast, interstate VoIP calls involve no such "reciprocity." The VoIP provider could be offering service originating over broadband in a geographic market anywhere in the United States (or the world). Yet it must be able to terminate calls to every PSTN line in the country. The volume of traffic terminating to any particular LEC will be unpredictable, dictated by whom the VoIP customer chooses to call (not the area where the VoIP provider markets service and originates calls). And, importantly, the LEC does not need anything from the VoIP provider. Therefore, unlike local inter-carrier reciprocal traffic, there is no reciprocity in the context of VoIP-to-LEC calls. LECs have unchallengeable bottleneck control over the VoIP-originated calls that they terminate to their own subscribers. 7/

The Commission is familiar with this "terminating PSTN bottleneck" problem in the context of traditional long distance. 8/ The Commission addresses this problem through regulation of the tariffed rates LECs may charge long distance companies. Here the Commission should prevent the same discrimination in the context of VoIP, leaving the VoIP service itself unregulated.

6/ *T-Mobile Declaratory Ruling*, ¶ 14.

7/ Moreover, VoIP-to-LEC traffic is clearly distinguishable from CMRS-LEC traffic as a legal matter. The Commission determined in the 1996 *Local Competition Order* that intra-MTA traffic between CMRS carriers and LECs should be treated as local traffic subject to reciprocal compensation arrangements. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16016, ¶ 1041 (1996) ("*Local Competition Order*"), *subsequent history omitted*. By contrast, the Commission has held that broadband VoIP-to-LEC "calls are not 'local' and 'long distance' in the sense that they are for traditional wireline [and wireless] telephone services." *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404, ¶ 27 (2004) ("*Vonage Preemption Order*"). The rationale for precluding tariffs, going forward, in the CMRS-LEC context was to encourage negotiations between carriers to develop reciprocal compensation, as contemplated in the 1996 Act and the *Local Competition Order*. *T-Mobile Declaratory Ruling*, ¶ 14. By contrast, there is no applicable past precedent and no clear rule at all regarding the termination of broadband VoIP-originated calls, a new, separate category of jurisdictionally interstate traffic. And as noted above, negotiations are not workable in this context

8/ "Thus, even if competitive pressures develop at the originating end as new entrants offer alternatives, the terminating end of a long-distance call may remain a bottleneck, controlled by the LEC providing access for a particular customer. * * * * * Accordingly, we are establishing regulatory requirements that will address the potential that incumbent LECs could charge unreasonable rates for terminating access." *Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, ¶¶ 349, 353 (1997), *subsequent history omitted*. The Commission has found that the same problem of bottleneck power over terminating access to an end-user applies in the context of CLECs as well as ILECs. *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order, 16 FCC Rcd 9923, ¶¶ 28, 30, 34 (2001).

B. Level 3's "Symmetrical Traffic" Argument Mischaracterizes the Market Problem Here

For similar reasons, Level 3 is wrong when it suggests that VoIP traffic flows to and from the PSTN are symmetrical and that WilTel's tariff proposal improperly focuses only on termination to the LEC. First of all, as discussed above, the vast majority of VoIP traffic today runs in one direction: from a broadband user-customer of the VoIP provider, and to one of millions of PSTN numbers. It is not "just as likely" that traffic will flow from the PSTN caller and terminate on the broadband pipe. Furthermore, PSTN-to-VoIP is not the source of the current market problem. Broadband providers do not seek termination payments when they complete calls originating on the PSTN. LECs (whether ILECs or CLECs) do seek compensation for PSTN termination of broadband-originated calls. Indeed, the Level 3 forbearance proceeding is focused almost exclusively on IP-to-PSTN traffic flows. Accordingly, it is appropriate that WilTel's proposal focuses on rules to constrain the LECs' market power over terminating traffic to the PSTN, rather than on traffic from the PSTN to IP networks, for which this market power problem is largely absent.

Second, Level 3 unwittingly makes the case for VoIP termination tariffs when it warns that the ILECs will have incentives to exploit their market power to discriminate and raise their rivals' costs. 9/ WilTel fully agrees, but CLECs like Level 3 have the same market power over access to their own customers. To the extent VoIP providers need to reach those PSTN lines, such CLECs have the same incentives as ILECs to raise their rivals' costs and the same ability to do so if permitted by regulation. .

The Commission will have to grapple with this LEC market power over VoIP termination in the intercarrier compensation rulemaking. The Commission will need to consider bill and keep and other mechanisms for VoIP and other termination that apply regardless of the geographical nature of the call. As the Commission begins to set the rules for VoIP, however, it must start by ensuring that LECs do not discriminate among various VoIP providers seeking termination to the PSTN. Such discrimination is a recipe for a non-competitive VoIP market. In particular, discrimination based on whether the VoIP provider also offers local service would unnecessarily force VoIP companies to become CLECs whether they want to or not. Moreover, it would facilitate mutual dealing on favorable terms between those LECs with the most end user lines in the country. Verizon and SBC, for example, could agree to terminate each other's VoIP traffic on a bill and keep basis, or at very low rates, without offering the same arrangement to others, severely limiting the ability of any other VoIP providers to compete.

Level 3 is being cute when it states that, under its forbearance petition, it "will collect reciprocal compensation for IP-PSTN traffic it terminates, and it will pay reciprocal

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9/ *Level 3 March 2 Letter* at 4-5. Moreover, the premise of Level 3's argument – that tariffs would allow LECs to impose any rate on VoIP providers – is wrong. Under Wiltel's approach, the Commission would mandate the rates, terms and conditions for VoIP termination.

compensation for IP-PSTN traffic it originates." 10/ That is essentially a statement that, if the Commission limits the ILEC to charging reciprocal compensation when it terminates Level 3's VoIP traffic, Level 3 will not charge the ILEC a different rate. But that solution does not address the market problem here - what either the ILEC or Level 3 will charge every other VoIP provider who seeks termination of interstate VoIP calls destined for PSTN end users of either the LEC or Level 3. The correct answer is that the two LECs will charge everyone else the same rate that they charge each other to terminate this interstate service. But the only way to achieve that outcome is for the two LECs to tariff that rate, making it available to each other and every other VoIP provider in the United States. 11/

C. The Level 3 Forbearance Approach Discriminates In Favor of VoIP Providers Who Also Are ILECs or CLECs

Level 3's third assertion is that its forbearance approach benefits all VoIP providers, and not just those who provide local exchange service. However, Level 3's argument proves the opposite.

Level 3 does not contest the point that, under WilTel's tariff plan, all VoIP providers could connect directly with all LECs and CLECs at non-discriminatory PSTN termination rates. Level 3 does not articulate any reason why a VoIP provider should not have that right. Instead, Level 3 defends its forbearance request based on the fact that it would put CLECs in the middle, where they can arbitrage PSTN termination for VoIP. Level 3 asks VoIP providers to take comfort from the fact that, even though they would not be eligible for reciprocal compensation-based VoIP termination themselves, they could interconnect with a CLEC (like Level 3) who would be.

With all due respect to Level 3, interstate VoIP service providers should not be forced to deal with CLEC middlemen who mark up ILEC termination rates and are free to favor their own VoIP services over those of others. VoIP providers should be able to terminate their

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10/ *Id*. at 5.

11/ Indeed, Level 3's own experience underscores why material discrimination in PSTN termination for VoIP is likely in the absence of tariffs. Level 3 has a unique position as a CLEC arising from its large position in the termination of local ISP-bound traffic (a local service that is a completely separate market from VoIP – which is neither local nor long distance). Level 3 has been able to obtain agreements with some of the ILECs for favorable VoIP termination rates in agreements that also typically address ISP-bound traffic. *See* Letter from John Nakahata, Counsel for Level 3, to Marlene Dortch, WC Docket No. 04-36 (filed Feb. 22, 2005) (summarizing Level 3's interconnection agreements with Verizon, BellSouth, and SBC in part). However, at least the Verizon/Level 3 agreement includes language making it impossible for other carriers to obtain the same benefits as Level 3. *See*, *e.g.*, Level 3 Amendment No. 1 to the Interconnection Agreement between Verizon Delaware Inc. and Level 3 Communications, LLC, Attachment A, p. 9, para. 3.2. (limiting eligibility to a CLEC that has filed a forbearance petition on VoIP termination with the FCC). This experience simply underscores that negotiation of VoIP termination is not a proper recipe for VoIP providers, including smaller CLECs and VoIP providers who do not want to or cannot enter the local exchange market on a large scale, or capture a unique high volume local market segment like ISP-bound traffic.

VoIP traffic directly to all LECs (ILECs and CLECs), and do so without having to enter the local service market or negotiate interconnection agreements across the country. It is fine if some interstate VoIP providers like Level 3 also want to provide non-VoIP local exchange service. But VoIP development will be severely chilled and distorted if provision of non-VoIP local service in a particular geographic market is a predicate to a VoIP company getting non-discriminatory VoIP termination rates in that same market.

D. VoIP Termination Tariffs are Consistent with Current Practice and the Least Regulatory Alternative

Level 3's final argument is that implementation of VoIP tariffs would further "fracture" the current intercarrier compensation regime.12/ Of course, it is the Commission, not WilTel, that "added another category" by ruling that broadband VoIP-to-PSTN calls are interstate and categorizing them as "not 'local' and 'long distance' in the sense that they are for traditional wireline telephone services." 13/ The Commission has a responsibility to define the rules for terminating this traffic over the PSTN

VoIP termination tariffs are a simple and familiar device for dealing with the bottleneck market power that ILECs and CLECs hold over termination in this particular zone, a bottleneck problem that the Commission recognizes in the analogous context of non-VoIP long distance. ILECs and CLECs know how to tariff, and can easily add a tariff term for VoIP termination. Contrary to Level 3's claim that VoIP termination tariffs would be more "complicated" and less "deregulatory" than its forbearance approach, tariffs are an administratively simple, long-established mechanism that can be established, reviewed, and if necessary investigated and modified, in a straightforward manner -- without the complexity and regulatory burden of requiring VoIP providers to negotiate individual interconnection agreements with hundreds of LECs and/or arbitrating such agreements before regulators in 51 different jurisdictions. 14/

Nor do VoIP termination tariffs necessarily mean new rates. WilTel has encouraged the Commission to look to existing termination rates as the proxy that LECs must use when terminating VoIP. For example, to the extent that the Commission is prepared to find that LECs in certain geographic areas should terminate VoIP at reciprocal compensation level rates, as Level 3 and others request, it can do so by requiring applicable ILECs and CLECs to look to reciprocal compensation provisions in local interconnection agreements for the proxy rate to be used in their interstate VoIP termination tariffs. This termination rate would be available to all VoIP traffic. Such an approach would apply the results of negotiations in a market in which traffic flows are more symmetrical (to use Level 3's language) -- and in which reciprocal

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12/ *Level 3 March 2 Letter* at 6.

13/ *Vonage Preemption Order*, ¶ 27.

14/ *Cf.* Letter from Kathleen Grillo, Verizon, to Marlene Dortch, WC Docket Nos. 04-36 and 03-266, Attachment at 27-28 (filed Feb. 24, 2005).

compensation may be more appropriate -- into a the VoIP market, where traffic flow is one way and negotiations are impractical. Alternatively, the Commission can set the interim VoIP termination rate using other methodologies, including the current proxy rate for ISP-bound termination, or interstate access, or something else. Different methodologies can be ordered for LECs in differeng geographic areas. The important thing is that rates for VoIP termination will be charged pending intercarrier compensation reform, and LECs must not be allowed to misuse their market power in the interim.

Finally, WilTel strongly believes that use of tariffs in this circumstance is the best policy approach to address the existing uncertainty regarding IP-originated traffic and would move the Commission further towards its goal of intercarrier compensation reform. In fact, following Level 3's approach would move in precisely the wrong direction – encouraging LECs to focus on customers that would allow them to obtain revenues from other carriers, both as a way to obtain additional revenue and as a way to leverage that ability to obtain more favorable rates for other traffic. At a time when the Commission is seeking to streamline and possibly substantially modify intercarrier compensation, adopting Level 3's approach would continue to encourage the gaming that the Commission is seeking to prevent. 15/ By contrast, WilTel's proposal will allow the Commission to provide for an interim stabilizing mechanism until it can resolve intercarrier compensation issues.

In sum, use of VoIP termination tariffs on an interim basis allows the Commission to address the current uncertainty without distorting the VoIP market by forcing VoIP providers to adopt LEC business models, and without prejudging the reform of intercarrier compensation. WilTel's proposal is a straightforward solution to a simple bottleneck problem. It will empower all VoIP providers to expand and broaden their businesses confident that this critical input will be available to them on a non-discriminatory basis. Tariffs avoid the illogical and counter-productive requirement that a VoIP provider must become an ILEC or a CLEC to obtain non-discriminatory termination rates, or depend on a CLEC middleman arbitraging such termination arrangements. VoIP termination tariffs will unlock a dynamic and fully competitive VoIP service market free of the confusion and discrimination that plagues VoIP termination to the PSTN today.

15/ In this respect, Level 3's characterization of WilTel's proposed approach as "anachronistic" amounts to be nothing more than a complaint that WilTel's approach will not allow the regulatory gaming that some carriers have been exploiting to date. *See supra* note 11.

If you have any questions, please contact the undersigned.

Respectfully submitted,

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